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Supreme Court of the United States

REPLY BRIEF FOR PETITIONERS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 366

JESSIE BALL DU PONT, EDWARD BALL, FLORIDA NATIONAL BANK OF JACKSONVILLE and ELBERT DENT, as Trustees of the Testamentary Trust Created under and by Virtue of the Last Will and Testament and Codicils thereto of ALFRED I. DU PONT, Deceased, and EDWARD BALL, ROGER L. MAIN, JESSIE BALL DU PONT, HOWARD S. WHEELER, PAUL L. PIERCE, CLYDE C. PIERCE, WALTER P. FULLER, S. WALLACE SHAFER, ST. JOE PAPER COMPANY, LEEDY, WHEELER & ALLEMAN, INC., and CLYDE C. PIERCE CORPORATION,

Petitioners,

v.

THE CRUMMER COMPANY AND R. E. CRUMMER & COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondents' Brief in Opposition in no sense meets the important legal issues which the Petition presents for resolution by this Court. Instead, it seeks to minimize their significance by treating them in part as foreclosed to this Court by the "law of the case," and in

part as not presented at all on the present state of the record. These attempts to circumvent the issues cannot obscure, first, that this proceeding squarely presents for the Court's determination important questions in the administration of the antitrust laws and, second, that these issues are ripe for decision.

1. Respondents make no contention that the first question presented by the Petition is not important enough to deserve the attention of this Court or that it will not have to be at some point faced and decided by this Court in this or another of the cases raising the question now pending in the federal judicial system. Rather, respondents seek only to avoid the question now. They do so on two inconsistent grounds: first, that the question cannot be decided now because it was already decided in a prior decision of the Court of Appeals and is accordingly the "law of the case"; and second, that it should not be decided now because there are fact issues to be presented to a jury.

These attempts to delay resolution of the important question of antitrust law which is presented by the decision below should not be permitted to postpone consideration of that question until the conclusion of a complex, expensive, and unnecessary trial of factual issues based upon a legal theory which has no foundation in law.

As far as respondents' references to the claimed "law of the case" are concerned, respondents have confused the question of "law of the case" with the question of what this Court may properly review. The doctrine of "law of the case" is no more than a recognition of the accepted degree of deference which one judge in a lower federal tribunal will give to an interlocutory prior ruling of another judge in the same court in the same case. Compare *Messenger* v. *Anderson*, 225 U. S. 436,

441; *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199; *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131, 134 (2d Cir. 1956). It in no way limits the matters open to any reviewing court, which may, of course, review all errors of law made at any stage of the litigation. Any opposite policy would obviously encourage the very reliance on interlocutory appeals which respondents purport to deplore.

In any event, respondents misstate the rulings of the Court of Appeals on the antitrust question. Respondents contend repeatedly that the first decision of the Court of Appeals, in reversing the dismissal of the amended complaint (223 F.2d 238), held that the amended complaint stated a cause of action, and that its ruling at that time is dispositive of the first question raised in the Petition. This contention ignores the controlling fact that the first decision of the Court of Appeals was in response to an amended complaint alleging that a false—presumably a libelous and scurrilous—memorandum had been filed with the Post Office Department pursuant to the alleged conspiracy (R. 82). In fact, while the original complaint failed to allege that the memorandum filed with the Post Office Department was false in any particular (R. 47-48), a major and essential purpose of the amended complaint was to thrust into respondents' alleged claim the necessary element of falsity in order to preserve their cause of action.[1] It was on the basis of this amend-

[1] The amended complaint alleges that the defendants adopted a "scheme to manufacture and prefer false charges of fraud" with the United States Government; that Main and Wheeler filed "a false accusation of fraud" with the United States Government; that the defendants "agreed as part of said scheme that a charge of fraud which was false and known to all of them to be false would be lodged" involving the Lee County refunding transactions; and that said charge would be filed by Main (R. 82-83).

ment to the complaint that the Court of Appeals sustained the amended complaint as stating a cause of action. Upon remand, however, respondents took the position that for purposes of the present issue they did not have to prove the falsity of the memorandum and, as the Petition for Certiorari shows, the memorandum was assumed to have contained no false material.[2] The decision of the Court of Appeals was that the filing of a truthful memorandum with the Post Office Department was an act upon which antitrust liability could be based.

This ruling, which impinges upon the recognized obligations of good citizenship and can seriously disrupt orderly government, merits review by this Court.

There is no basis for respondents' reliance in this respect upon the fact that the action of the Court of Appeals contemplates further litigation. This is merely the usual attempt by a respondent to avoid a decision now on a point of law which is dispositive of his case, in the hope that something will happen in the course of the case which will make it unnecessary for him to defend the point on its merits. Respondents' contentions in this regard cannot avoid the fact that the question decided by the Court of Appeals "is fundamental to the further conduct of the case" and is for that reason ripe for review by this Court at this time. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734, n. 2; *Larson* v. *Domestic and Foreign Corporation*, 337 U. S. 682, 685,

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[2] The memorandum to the Post Office Department, which is set forth in full as an appendix to the Petition (pp. 24a-29a), merely directed the attention of the Department to possible violations of the federal mail fraud statutes. As is clear from the text of the memorandum, it was confined to a straightforward account of the fa

n. 3.[3] This governing consideration is particularly applicable in this case where the question presented is of fundamental importance not only to this litigation, but also to the development of federal antitrust doctrine generally and to the ultimate disposition of a number of other pending cases.

2. The Brief in Opposition similarly fails to discuss on their merits the other substantial questions stated in the Petition. These arise from the decision of the Court of Appeals expanding the doctrine of fraudulent concealment to cover an act which was not affirmatively concealed at all, and which was claimed to have been part of an alleged single conspiracy about which respondents plainly—on the face of their own amended complaint, taken together with their own writings—knew virtually everything.

Respondents seek to avoid these questions of law by treating the case as if it did not turn on the memorandum filed with the Post Office Department. This ignores every relevant factor used in specifying the issues to be determined in litigation. It ignores, first, respondents' own statement of the issues filed in the District Court (R. 522-23); second, the express and explicit statement by the District Court that respondent's case turned on the filing of the memorandum with

[3] The compelling policy considerations for deciding such fundamental questions of law where their decision may avoid protracted litigation are reflected in the recent enactment of an amendment to Section 1291 of Title 28 of the United States Code to permit interlocutory appeals from decisions of this nature. P.L. 85-919, 72 Stat. 1770, September 2, 1958. The reports of both houses of Congress emphasize the need in protracted and expensive litigation, and particularly in antitrust litigation, for a method of prompt and authoritative determination of vital questions of law which will govern the future conduct of the litigation. H.R. Rep. No. 1667, 85th Cong. 2d Sess.; Sen. Rep. No. 2434, 85th Cong. 2d Sess.

the Post Office Department (App. to Petition, p. 6a); and finally, the Court of Appeals' recognition that respondents' claim that they did not know of their cause of action was based in substance upon the contention that they did not know who had filed the memorandum with the Post Office Department (*id.*, p. 13a, n. 3, p. 17a).

The Brief in Opposition attempts to create the impression that the issue of fraudulent concealment involved many fact issues other than respondents' lack of knowledge of the identity of the persons filing the memorandum with the Post Office Department. In this effort to becloud the important questions of law with irrelevant issues of fact, respondents have resorted to a highly colored version of what they term evidence in the case—a self-serving "collation of the evidence" in which innuendo and irresponsibility have been substituted for fact. Petitioners will make no further comment on this inaccurate and intemperate statement because it has no bearing on the legal question determinative of this case—whether respondents' lack of knowledge of the single fact that Main and Wheeler submitted the memorandum to the Post Office Department could as a matter of law toll the statute.

The fundamental point is that no such questions of fact are involved in the case as it comes to this Court. The issues presented are important questions of law turning on the legal effect of the filing of a single truthful memorandum with the Post Office Department. The pretrial statement filed by respondents based their claim of fraudulent concealment squarely on the facts surrounding the filing of the memorandum, as the record plainly shows (R. 522-23). Respondents' claims to the contrary in their Brief in Opposition are

refuted by the opinion of the District Court which stated (App. to Petition, p. 6a):

> "It appears from this record that plaintiffs rest their entire case of fraudulent concealment on the act of Main and Wheeler in filing the memorandum with the Post Office Department on May 21, 1941, and if the Court is in error as to the law on this issue, then fraudulent concealment as alleged has been fully established by the plaintiffs as to this one act."

The Court of Appeals similarly characterized respondents' lack of knowledge of the identity of the persons filing the memorandum as "the main support" for their claim (*id.*, p. 13a, n. 3). In describing respondents' position, the court emphasized (*id.*, p. 17a):

> "...although they knew they were being opposed and bitterly fought on many fronts by several of the parties who were later joined as defendants in this suit, they were unable to learn of the connection between them that was essential to the existence of a conspiracy until the discovery of the Main-Wheeler activities."

Although the Court of Appeals also referred to some of the other contentions made by respondents, at no place does its opinion suggest that the District Court did not correctly define the issue as turning on the filing of the memorandum with the Post Office Department. In fact, the opinion of the Court of Appeals taken as a whole shows clearly that respondents' claim that they did not know who had filed the memorandum was crucial to their showing of fraudulent concealment even under the novel and unsupported version of that doctrine which was announced by the Court of Appeals.

CONCLUSION

For the reasons stated here and in the Petition for Certiorari, which stands unanswered, petitioners pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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